IP 04-1845-C T/L Lester v Shares
Judge John D. Tinder Signed on 07/26/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RONALD W. LESTER,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01845-JDT-WTL
	)	
SHARES, INC.,	)	
	)	
Defendant.	)	

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SOUTHERN DISTRICT OF INDIANA
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RONALD W. LESTER,	)	
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Plaintiff,	)	
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vs.	)	1:04-cv-1845-JTD-WTL
	)	
SHARES, INC.,	)	
	)	
Defendant.	)	

ENTRY ON MOTION TO DISMISS (DKT. NO. 24)[1]

The Plaintiff, Ronald W. Lester, has brought disability discrimination and retaliation claims against his former employer, Shares, Inc. ("Shares"). The case is now before the court on a Rule 12(b)(6) motion to dismiss filed by Defendant Shares. The Defendant contends that Count III of the Amended Complaint, alleging a violation of the Family and Medical Leave Act ("FMLA"), fails to state a claim upon which relief can be granted.

I. BACKGROUND

The Plaintiff began his employment at Shares in approximately October 2001. (Am. Compl. ¶ 7.) During May 2002, the Plaintiff was injured on the job and became disabled with a heart condition that limited his daily activities. (*Id*. ¶ 9.) The Plaintiff's doctor ordered him not to work for approximately three months, from July 2002 to

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

approximately September 2002. (*Id*. ¶ 10.) At the conclusion of this period, the Plaintiff returned to work with accommodations made for his disability. (*Id*. ¶ 12.) After Mr. Lester was not given his annual raise nor retirement, he complained to Shares regarding issues of disability discrimination and worker's compensation. (*Id*. ¶¶ 13, 14.) Shortly thereafter, Shares terminated the Plaintiff on June 2, 2003. (*Id*. ¶ 15.) On March 25, 2004, the Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (*Id*. ¶ 16.) Following an amended discrimination charge to the EEOC on March 30, 2004, the Plaintiff received a Notice of Right to Sue on August 19, 2004. (*Id*. ¶¶ 17, 19.) On April 12, 2005, he filed an Amended Complaint in this court alleging that the Defendant's actions violated the FMLA.

II. DISCUSSION

Shares argues that the Plaintiff was not eligible for leave under the FMLA and now moves pursuant to Rule 12(b)(6) to dismiss Count III of the Amended Complaint. Dismissal in this situation is appropriate only when "there is no possible interpretation of the complaint under which it can state a claim." *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 637 (7th Cir. 2004). In performing this analysis, the court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the plaintiff. *Id.* A plaintiff is required to specify only the "bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). A complaint compliant with the federal rules of civil procedure "cannot be dismissed on the ground that it is conclusory or fails to allege facts." *Id.* However, the court is not "required to ignore facts alleged in

the complaint that undermine the plaintiff's claim." *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). Thus, a plaintiff can plead herself out of court by alleging facts that establish the defendant's right to prevail. *Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir. 1998).

To be eligible for leave under the FMLA, an employee must be employed "for at least 12 months by the employer with respect to whom leave is requested[.]" 29 U.S.C. § 2611. In his Amended Complaint, the Plaintiff described a period from July 2002 to approximately September 2002 in which he took medical leave. The Defendant, seizing on such language, asserts that the Plaintiff cannot be considered an eligible employee under the FMLA because the Plaintiff has pleaded that he only worked at Shares for nine months prior to the commencement of his leave. (Def.'s Br. at 2.) Shares contends that the Plaintiff chose to plead in specificity and not generally by "incorporating into Count III specific dates as to when he took his medical leave . . . ." (Def.'s Reply Br. at 4.) As such, the Defendant argues that the Plaintiff is not covered by the FMLA.

While under the federal system of notice pleading a claimant is not required to list all of the facts underlying claim, the claim must be concise and direct. Fed. R. Civ. P. 8(e). On one hand, a plaintiff can make a conclusory pleading. *See Bennett*, 153 F.3d at 518 (stating that a general allegation such as "I was turned down for a job because of my race" is a sufficient complaint). Conversely, a plaintiff, such as Mr. Lester, can instead chose to be specific in his pleadings. By indicating the July 2002 period of leave and incorporating it into Count III, Mr. Lester chose to make more than a simple

conclusory pleading. Opting for a specific pleading, July 2002 is the only leave period incorporated into Count III. If it is understood that this is the period in which the Plaintiff allegedly took his FMLA leave, the Plaintiff has pleaded a fact that renders his current claim seemingly invalid. The court notes that in his response brief the Plaintiff argues that "he returned to work in September, 2002, but . . . required leave for his injury after that date." (Pl.'s Resp. Br. at 1.) Therefore, there is the possibility of a second leave of absence due to injury after October 2002 that may establish a factual basis for Mr. Lester's FMLA claim.

Nevertheless, the Plaintiff opted to plead with specificity and the court is "confined to the pleadings when considering a motion to dismiss." *In re Wade*, 969 F.2d 241, 249 (7th Cir. 1992). As the July 2002 leave was incorporated into Count III, the Plaintiff's FMLA claim is currently invalid. Moreover, the pleaded facts do not provide notice to Shares as to what period the Plaintiff asserts was taken under the FMLA. If the Plaintiff can plead a claim involving a time period that meets the statutory requirements of the FMLA, the issue whether this medical leave was actually taken under the FMLA is a fact that can be determined in discovery. *See Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (stating that discovery and other pretrial procedures serve to disclose more precisely the basis for a claim and more narrowly define the disputed facts and issues); *Bennett*, 153 F.3d at 519 (concluding that "litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of the party's proof leads to windy complaints and defeats the function of Rule 8").

Thus, as it stands with the July 2003 medical leave specifically incorporated into Count III - which is the only leave period described within the Amended Complaint - this claim must be dismissed. The dismissal is without prejudice, however, and the Plaintiff has thirty days from the date of this entry to file an amended complaint alleging a leave period consistent with the FMLA eligibility requirements if he can do so within the confines of Rule 11.

III. CONCLUSION

Based on the foregoing, the Defendant's Rule 12(b)(6) motion to dismiss Count III (Dkt. No. 24) is **GRANTED WITHOUT PREJUDICE**. The Plaintiff has **thirty (30) days** from the date of this entry to file an amended complaint consistent with this entry. If he fails to re-plead in that time frame, the dismissal will become with prejudice.

ALL OF WHICH IS ENTERED this 26th day of July 2005.

John Daniel Tinder, Judge
United States District Court

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Magistrate Judge William T. Lawrence